SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970
No. 1509

STATE OF CALIFORNIA,

Petitioner,

vs.

CLENNON WASHINGTON KING,

Respondent.

Appendices to Petition for Writ of Certiorari to the Supreme Court of the State of California.

EVELLE J. YOUNGER,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
MARK LEICESTER,
Deputy Attorney General,
600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-2616,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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APPENDIX A.

Decision of the Supreme Court of the State of California.

In the Supreme Court of the State of California, in Bank.

In re Clennon Washington King on Habeas Corpus. Crim. 14130.

On February 7, 1967, after a nonjury trial, petitioner Clennon Washington King was convicted of failure to support his children in violation of Penal Code section 270.[1] Based on petitioner's absence from the state for 30 days, the offense was adjudged a felony. In this habeas corpus proceeding, petitioner attacks the constitutionality of the felony provision of section

[1]Penal Code section 270 provides in relevant part: "A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars ($1000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. If the father, during such violation, remains out of the state for 30 days, or if he fails or refuses to comply with the order of a court of competent jurisdiction requiring him to make any provision for the maintenance, support, medical treatment or other remedial care of such minor child and remains out of the state forf 10 days without doing so, he is guilty of a felony. . . . Proof of abandonment or discertion of a child by such father, or the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse. . . . Proof of abandonment or desertion of a child by such father or the omission by such father to furnish such food, shelter, clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the state."

270.[2] We hold that insofar as the section punishes nonsupporting fathers who "remain out of the state for 30 days" more heavily than nonsupporting fathers who are within California, this penal provision establishes a classification not sufficiently related to any legitimate governmental objective, and as such violates the equal protection clause of our Constitution.

Petitioner, a school teacher and minister, spent his childhood, received his education, and was married in the South. Although petitioner held teaching credentials and had earned an advanced academic degree, he experienced difficulty in finding employment, apparently because he had been active in the early phase of the civil rights movement and had become a controversial figure. In December 1958, petitioner, his wife, and their five children moved to California, and purchased a home in Compton. After initiating procedures to obtain a California teaching credential (a process that was to take several months), petitioner obtained part-time employment in the post office and as a porter in

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[2]After we issued an order to show cause, petitioner was discharged from custody upon completion of his term. Because the burdens of a felony conviction are substantial and have a continuing impact upon the convicted defendant even after he has served his term, the discharge of petitioner during the pendency of this proceeding does not render his petition moot. (Cf. Carafas v. LaVallee (1968) 391 U.S. 234, 237; Sibron v. New York (1968) 392 U.S. 40; People v. Succop (1967) 67 Cal.2d 785, 789-790.) Similarly, although ordinarily a writ of habeas corpus will not be issued when the claimed error could have been, but was not, raised on appeal, petitioner's arguments are based in part on decisions of the United States Supreme Court rendered subsequent to his conviction and thus present "special circumstances" constituting an excuse for failure to employ the remedy of appeal. (In re Black (1967) 66 Cal.2d 881, 886-887.) Moreover this court has uniformly held that the constitutionality of legislation is always open to challenge on habeas corpus (see, e.g., In re Dixon (1953) 41 Cal.2d 756, 762-763).

a Beverly Hills department store. He began to build a congregation in a San Pedro church to which he had been appointed pastor, and, also, undertook the publication of a religious newsletter. His earnings were not sufficient to enable the family to retain the home they were purchasing, however, and it became necessary to give up the house, apply for public assistance, and move into public housing. The King's sixth child was born in July 1959.

In November 1959 petitioner moved his family to Rosarita Beach in Mexico in the belief that his missionary activities, which then consisted primarily of publishing the newsletter, could be carried on more economically in Mexico. At the trial, petitioner testified that after learning that it was not possible formally to establish a permanent residence in Mexico at Tijuana, the nearest large city, he left his family on December 5, 1959, to go to Mexico City. He expected to be absent only a few days and left $50 with his wife for food and other necessities.

Mrs. King testified at trial that she was unaware of her husband's destination or plans and, thus, two days after his departure, on December 5, 1959, she left Rosarita Beach with her children and traveled to San Diego where she applied for, and received, public assistance. Mrs. King thereafter obtained employment as a licensed vocational nurse, but the family continued to receive public assistance to supplement her earnings. Petitioner contributed nothing to the support of the family after he left Rosarita Beach.

When petitioner learned that his wife and children had returned to the United States and were in San Diego, he attempted to contact them by letter. He did

not follow them to San Diego, however, but instead traveled to Albany, Georgia, where he acquired a house, a store-front office, and a congregation, and repeatedly urged his wife and children to join him there. He sent letters, telephoned, and, finally, in July 1960 went to San Diego in an attempt to persuade his family to rejoin him, but Mrs. King and the children chose to remain in California.

California authorities then instituted nonsupport proceedings against petitioner, apparently under the Uniform Reciprocal Enforcement of Support Act,[3] and later sought petitioner's extradition for violation of Penal Code section 270. Several years thereafter, in 1966, King surrendered to authorities in Chicago, Illinois, waived extradition and was returned to California for criminal prosecution.

In California petitioner was charged by information with failure to support his children from July 1, 1960, through June 1, 1966, and with being absent from the State from July 10, 1960, through June 1, 1966, in violation of section 270 of the Penal Code. After a non-jury trial the court found King guilty of the charged felony. Although the trial court did not specifically find that petitioner had been out of the state for a 30-day period, the court, in rendering its judgment, fully reviewed petitioner's testimony regarding his activities since 1960. The testimony clearly established that King had been absent from the state for more than the statutory period. Under these circumstances the finding of defendant's absence from the state for the requisite period of time, implicit in the judgment of conviction, quite obviously rested on King's own testi-

[3]Code of Civil Procedure, §§ 1660-1661.

mony and not on the statutory presumption of absence.[4]

Petitioner attacks his felony conviction on the ground that the felony provision of section 270 violates constitutional strictures of equal protection. He argues that in punishing a father who "remains out of the state" more severely than a father remaining within the state, the provision establishes a classification not sufficiently related to any legitimate governmental purpose and effectively undertakes an impermissible invidious discrimination against non-California residents. For the reasons discussed below, we conclude that the felony provision of section 270 must succumb to the constitutional attack mounted by petitioner.

It is basic that the guarantees of equal protection embodied in the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California Constitution, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction. This principle, of course, does not preclude the state from drawing any distinctions between dif-

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[4]Section 270 provides in part that "Proof of abandonment or desertion of a child by such father or the omission by such father to furnish such food, shelter or clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the state." Although petitioner suggests that the trial court did not believe it necessary to make a specific finding as to absence in view of this presumption, on the instant record we are convinced that the court's conclusion was based on evidence introduced at trial rather than on the presumption.

If the conviction were grounded on this statutory presumption, however, it could not withstand constitutional due process scrutiny, for, as the Court of Appeal has held (People v. Johnson (1968) 258 Cal.App.2d 705, 709), there is no rational connection between the fact presumed (absence from the state) and the fact to be proved (more than 30 days of failing to support) (see Leary v. United States (1969) 395 U.S. 6, 36; People v. Stevenson (1962) 58 Cal.2d 794, 797).

ferent groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose. (Rinaldi v. Yaeger (1966) 384 U.S. 305, 308-309; Baxstrom v. Harold (1966) 383 U.S. 107, 111; Blumenthal v. Board of Medical Examiners (1962) 57 Cal. 2d 228, 233.) Moreover, "in cases involving 'suspect classifications' or touching on 'fundamental interests' . . . the state bears the burden of establishing not only that it has a *compelling* interest which justified the law but that distinctions drawn by the law are *necessary* to further its purpose." (Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785; see Shapiro v. Thompson (1969) 394 U.S. 618, 638; Sherbert v. Verner (1963) 374 U.S. 398, 406. See generally *Developments in the Law-Equal Protection* (1969) 82 Harv. L.Rev. 1064, 1120-1131.)

Section 270 of the Penal Code, in prescribing varying penalties for its violation, distinguishes between two "'categories" or "classifications" of nonsupporting fathers—(1) those nonsupporting fathers who "remain out of the state" for 30 days and (2) those who do not and the section singles out those falling within the former classification for more severe punishment. Thus, under the section as presently drafted, any father who "remains out of the state" of California for 30 days while not supporting his child is guilty of a felony; a father who commits the identical act of criminal nonfeasance, but happens to be within California, is guilty only of a misdemeanor.

The application of this distinction may often lead to what appears to be fortuitous, and even arbitrary, results. Thus, for example, if a father of a family in New York fails to provide support for his children,

and his family subsequently moves to San Francisco, the father by remaining in New York for 30 days will be guilty of a felony; a non-supporting father in Los Angeles whose family moves to San Francisco, will, by contrast, only be guilty of a misdemeanor if he remains in Los Angeles. Although the *criminal quality* of the New York father's conduct appears to be no different than that of the Los Angeles father, by the terms of section 270 he has committed a much more serious crime and is subjected to harsher penalties.

To justify this seemingly illogical classification the People proffer the two broad objectives which underlie the nonsupport provision generally—(1) to protect public funds from the financial burden of supporting children whose fathers are able to support them and (2) to deter fathers from subjecting their children to the adverse impact of becoming public charges. We can discern no rational relationship, however, between these unquestionably valid general purposes and the distinguishing factor—the *location* of a nonsupporting father—upon which the felony-misdemeanor classification turns. As the Court of Appeal pointed out in People v. Jones (1967) 257 Cal.App.2d 235, the nature of the crime of non-support does not vary with the place of its commission: "[d]iscrimination *solely* on the basis of location inside or outside of the state bears no more relation to the punitive and deterrent purposes of section 270 than differing locations of nonsupporting fathers within this state." (Original italics.) (257 Cal.App.2d at pp. 238-239.) As odious as the offense of non-support of a child may be, it does not take on varying ethical coloration because of its geographic locale. Thus, when viewed in relation to the main purposes of the criminal nonsupport provision,

the classification drawn appears arbitrary and irrational.

Shifting its grounds of justification, the state argues in the alternative that another governmental purpose justifies the distinction drawn between fathers within and without California. The state contends that it has a legitimate interest in factilitating the enforcement of the support obligations of section 270, and reasons that because of the difficulty in enforcing such obligations against absent fathers, the provision serves to aid that enforcement by "encouraging" absent fathers to move to and remain in California. As we undersand this contention, the state claims the authority to impose an additional criminal sanction simply to deter fathers from remaining out of the state. Although we concede that the felony provision of section 270 may bear an arguable rational relationship to this goal of "encouraging" nonsupporting fathers to move to, or remain in, California, where they will be more amenable to this state's process, that relationship cannot justify the classification. Such a purpose—to require individuals to move to or remain in California—lacks constitutional sanction because it violates the individual's constitutional right to choose his own domicile and to travel freely throughout the country.

As the United States Supreme Court noted in United States v. Guest (1966) 383 U.S. 745, 757-758: "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been fimly established and repeatedly recognized . . . [T]he right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary

concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under our Constitution." (See Edwards v. California (1941) 314 U.S. 160, 178-181, 183-185 (Douglas, J. (joined by Black and Murphy, JJ.) and Jackson, J., concurring in separate opinions); Twining v. New Jersey (1908) 211 U.S. 78, 97; Slaughterhouse Cases (1873) 83 U.S. (16 Wall.) 36, 79; Ward v. Maryland (1871) 79 U.S. (12 Wall.) 418, 430; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180; Crandall v. Nevada (1868) 73 U.S. (6 Wall.) 35, 43-44; Passenger Cases (1849) 48 U.S. (7 How.) 282, 492; Corfield v. Coryell (C.C.E.D.Pa. 1825) 6 F.Cas. 546 552.)

The recent United States Supreme Court decision in Shapiro v. Thompson (1969) 394 U.S. 618, clearly demonstrates that this constitutional "right to travel" embodies more than merely the right to cross state lines and move about the country; it includes as well the right of the individual freely to choose the state in which he wishes to reside. In *Shapiro,* the Court, in examining the validity of residency requirements imposed by several states as a condition to receiving welfare benefits, found that a main purpose of such requirements was to inhibit the migration of needy persons into those states; the court rejected such a purpose as constitutionally impermissible in light of the needy individuals' "right to travel." The interest realistically impaired by the residence provisions at issue in *Shapiro* was not an indigent's right to "travel" across or within a given state, but his right to travel to, and make his home in, a particular state. In declaring that the impairment of an individual's choice to live wherever he wants within

this country constitutes a violation of the individual's constitutional "right to travel," the Court recognized that this historic and fundamental right rested not only on a view of the states as necessary links in the network of a "national highway" (see United States v. Guest (1966) 383 U.S. 745; Crandall v. Nevada (1868, 73 U.S. (6 Wall.) 35) open to the passage of all, but, just as fundamentally, was grounded in a motion of the Federal Union as a "national homeland" open to the residence of all.[5]

The provision at issue in the instant case, of course, does not seek to inhibit people from moving to California but, conversely, effectively *requires* nonsupporting fathers living outside the state to move into California to avoid additional criminal penalties. Such a provision embodies as invidious a discrimination against the exercise of constitutional rights as the statutes before the Court, in *Shapiro,* however, for an individual's right to choose his place of domicile obviously affords him the right to select a home outside this state. Because the provision posits additional criminal liability on an individual *solely* because he chooses to remain outside the state, we find that the felony provision constitutes a denial of the equal protection

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[5]Justice Stewart, concurring in the *Shapiro* decision, declared that the constitutional right to travel, "of course, includes the right of 'entering and abiding in any State in the Union [citation] . . .'" (394 U.S. at p. 642) (see Edwards v. California (1941) 314 U.S. 160, 183 (Jackson, J., concurring) ("This court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing."); Corfield v. Coryell (C.C.E.D. Pa. 1823) 6 F. Cas. 546, 552 ("The right of a citizen to pass through, or to reside in any other state"). (See also In re Higgins (Family Ct. 1965) 46 Misc. 2d 233 [259 N.Y.S.2d 874, 877-882].)

of the laws and is therefore invalid.[6] "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson 390 U.S. 570, 581 (1968)." (Shapiro v. Thompson (1969) 394 U.S. 618, 631.[7]

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[6]The felony classification also appears constitutionally defective as violative of the Privileges and Immunities Clause of article IV, section 2, of the Federal Constitution, providing that "[t]he citizens of each State shall be entitled to all privileges and immunities of citizens in the several states," since the effect of section 270 will generally be to arbitrarily discriminate against non-California citizens. Although the classification is not drawn precisely along state citizenship lines, in practice the provision undoubtedly operates to penalize out-of-state citizens more heavily than California citizens, even though both have committed the same crime, and as such would appear to exhibit the very vice to which article IV, section 2, was addressed. (See Toomer v. Witsell (1948) 334 U.S. 385; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180.)

The coincident application of the Privileges and Immunities Clause and the constitutional right to travel in this case is not surprising, since several cases in the past have designated article IV, Section 2, as one source of the constitutional right to travel. (See Corfield v. Coryell (C.C.E.D.Pa. 1825) 6 F.Cas. 546, 552; Paul v. Virginia (1869) 75 U.S. (8 Wall.) 168, 180; Ward v. Maryland (1871) 79 U.S. (12 Wall.) 418, 430.)

[7]Inasmuch as section 270 serves to penalize the exercise of defendant's fundamental constitutional right to travel, its classification scheme could of course only be justified by a showing that the provision is "necessary to promote a *compelling* governmental interest." (Shapiro v. Thompson, 394 U.S. 618, 634; cf. Westbrook v. Mihaly (1970) 2 Cal.3d 765, 784-785.) Since we find that the basic objective of the felony provision—to induce nonsupporting fathers to come to California—is not a constitutionally legitimate one, we have no occasion to apply the compelling governmental interest test in the instant case.

Although the People claim that the objective served by the felony provision should be seen as the facilitation of the administration of support obligations, rather than as the movement of nonsupporting fathers to California, we believe analysis is only obscured by the proffer of this broader, though not unrelated, "governmental purpose." In the *Shapiro* case the states sought to justify the challenged residency requirement by a similar "generalized" purpose of "protecting the public fisc"; while the court

(This footnote is continued on the next page)

We note that the statute which we examine in the instant case is *not* one which singles out, for greater punishment, nonsupporting fathers who *flee* from California with the intent to hinder the state's enforcement of support obligation or which focuses on those who "remain out of the state" for the *purpose* of evading California process and sanction. (Cf. 18 U.S.C. §1073 (interstate flight with intent to avoid prosecution).) Section 270 does not purport to hinge its more severe felony sanction on an additional moral culpability which may conceivably be attributed to the conscious "evader"; instead it casts its felony net more widely and ensnares all those nonsupporting fathers who happen "to remain out of the state" for 30 days, whether the father was intentionally evading California process or not.[8]

The People suggest, however, that this court follow the lead of the Court of Appeal in People v. Jones (1967) 257 Cal.App.2d 235, 239, and construe the felony provision as applying only "to a resident father

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conceded the propriety of this "fiscal responsibility" purpose, it held that the objective could not be achieved "by invidious distinctions between classes of its citizens." (394 U.S. at p. 633.) In like manner, the state's interest in administering its support obligation law cannot be achieved by discriminating against that class who choose to remain outside the state. (Accord Carrington v. Rash (1965) 380 U.S. 89, 96 ("The [constitutional right to vote] . . . means, at the least, that states may not casually deprive a class of individuals of the right to vote because of some remote administrative benefit to the state."); cf. Bruton v. United States (1968) 391 U.S. 123, 134-135.)

[8]Under the federal law proscribing interstate flight to avoid prosecution "the gravamen of the offense . . . is that the defendant fled a state with intent to avoid prosecution therein, *and mere absence from the state of prosecution . . . is not sufficient proof of the federal crime.*" (Italics added.) (Barrow v. Owen (5th Cir. 1937) 89 F.2d 476, 478; see also Maenza v. United States (5th Cir. 1957) 242 F.2d 339, 341; Reis v. U. S. Marshad (D.Pa. 1961) 192 F.Supp. 79, 81, State v. Miller (1966) 76 N.M. 62, 67 [412 P.2d 240, 243].)

who *compounds* his offense of omission (nonsupport) with an action of commission, i.e., fleeing the state."[9] Although wherever a statute is reasonably susceptible of an interpretation consistent with the Constitution, the courts will give it such construction to preserve its constitutionality (Simpson v. City of Los Angeles (1953) 40 Cal.2d 271, 280), we do not believe that the construction adopted in *Jones* can be reconciled with the plicit language of section 270. By its unequivocal terms, the felony provision of section 270 applies to every nonsupporting father "who remains out of the state" for 30 days; this language is too clear to permit us to construe it as intended to apply only to resident fathers who flee the state to evade their support obligations. If elimination of objectionable parts of a statute requires a wholesale rewriting, a court's attempt to do so transgresses both the legislative intent and the judicial function. (Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 25; People v. Stevenson (1962) 58 Cal.2d 794, 798; Los Angeles v. Lewis (1917) 175 Cal. 777, 781.)[10]

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[9]The Attorney General argues that as thus construed the felony provision would be applicable to defendant since he "brought his family in California, had lived in California, and had left his family here in California while wilfully failing to support them." Defendant, however, neither left his family in California nor "fled" from California; he moved *with* his family to Rosarita Beach, Mexico, planning to reside therein, and only then left his family with inadequate support. Although the state argues that defendant should reasonably have known that his family would return to California for public assistance, and thus can be charged with leaving his family without support in California, there was still no showing that the avoidance of his support obligations was a dominant purpose of defendant's departure from the state (cf. Hett v. United States (9th Cir. 1965) 353 F.2d 761, 763, cert. den. 384 U.S. 905). In any event, since we conclude that the statute cannot be so construed, we need not resolve these contentions.

[10]Inasmuch as a criminal statute positing heavier penalties on those nonsupporting fathers who flee the state for the purpose

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Our conclusion that the felony provision of section 270 lacks constitutional viability does not affect the validity of the remainder of the statute. Having been independently enacted (Stats. 1939, ch. 1001, §1, p. 2783) and bearing no necessary relationship to the balance of the statute, the felony provision may be severed. "[U]nconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions." (Danskin v. San Diego Unified Sch. Dist. (1946) 28 Cal.2d 536, 555; People v. Lewis (1939) 13 Cal.2d 280, 284.) Inasmuch as petitioner's conviction of the felony necessarily included a finding of guilt as to misdemeanor nonsupport, our conclusion herein does not require that we set aside the conviction in its entirety.

The Superior Court of the County of San Diego is directed to correct its records in conformity with our decision herein to reflect that the offense of which petitioner was convicted in People v. Clennon Washington King, S.C. No. 9879, is a misdemeanor.

Tobriner, *J.*

We concur:

Wright, *C. J.*
McComb, *J.*
Peters, *J.*
Mosk, *J.*
Burke, *J.*
Sullivan, *J.*

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of avoiding their obligations is not properly before us, we, of course, intimate no opinion on the contitutionality of such a statute.

Appendix B.

Order Denying Rehearing.

In the Supreme Court of the State of California, in Bank. Crim. No. 14130.

In re King of Habeas Corpus.

Filed: Oct. 28, 1970.

Respondent's petition for rehearing DENIED.

/s/ Wright
Chief Justice

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EVELLE J. YOUNGER,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

MARK LEICESTER,
Deputy Attorney General,

600 State Building,
217 West First Street,
Los Angeles, Calif. 90012,
(213) 620-2616,

Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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I

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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

STATE OF CALIFORNIA,

Petitioner,

vs.

CLENNON WASHINGTON KING,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California

The State of California respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on October 2, 1970.

Opinions Below

The unreported decision of the Court of Appeal rendered on September 13, 1967, in Case No. 4th Crim. 2849 affirmed respondent's conviction. A certified copy of the unreported decision is filed with this Court. The opinion of the California Supreme Court reducing respondent's conviction from a felony to a misdemeanor, rendered on October 2, 1970, is reported as *In re King* (1970) 3 Cal. 3d 226, 90 Cal. Rptr. 15, 474 P. 2d 983. A certified copy of said decision is filed with this Court and will hereinafter be cited as "Decision."

Jurisdiction

The opinion of the California Supreme Court issued on October 2, 1970. A petition for rehearing was denied on October 28, 1970. On January 15, 1971, an order was entered extending the time for filing the petition for writ of certiorari to and including March 27, 1971. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. section 1257(3) and Rule 22 of the Rules of the Supreme Court of the United States, since the validity of a state statute has been drawn in question and a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented

1. Do statutory provisions making the misdemeanor of willful nonsupport a felony when committed by an offender who simultaneously remains outside the territorial boundaries of the State of California for a period in excess of 30 days deny equal protection of the laws by imposing an invidious discrimination against the federal right to travel?

2. Do statutory provisions making the misdemeanor of willful nonsupport a felony when committed by an offender who simultaneously remains outside the territorial boundaries of the State of California for a period in excess of 30 days abridge the privileges and immunities of citizens of the United States and of the several states?

Statutes Involved

The Constitutional and statutory provisions are set forth in the Decision. They are as follows:

United States Constitution, Fourteenth Amendment;
United States Constitution, article 4, section 2;
California Penal Code section 270.

History of the Case

In an information filed by the District Attorney of San Diego County, respondent was charged with willful failure to provide for minor children in violation of section 270 of the California Penal Code. The information further alleged that during the period of said failure to support, respondent remained out of the state for more than 30 days. [Cl. Tr. p. 1.][1]

Respondent and all counsel waived trial by jury. [Cl. Tr. p. 22.] The court found respondent guilty as charged in the information. [Cl. Tr. p. 23.] Pursuant to section 1203.03 of the California Penal Code, respondent was temporarily placed for a period not to exceed 90 days with the Department of Corrections for observations and examination. [Cl. Tr. p. 13.] Following said commitment and examination, respondent was returned to the trial court. [Cl. Tr. p. 14.]

Respondent was sentenced to the state prison for the term prescribed by law, sentence to run consecutively with respect to any prior and incomplete sentences. [Cl. Tr. pp. 15, 25.] Respondent appealed from the judgment of conviction.

In an appeal to the Fourth Appellate District, respondent's conviction was affirmed. *People v. King*, 4th Crim. 2849 (1968). Respondent's petitions for writ of habeas corpus in the Superior Court of San Luis Obispo County and in the Second Appellate District, Court of Appeal, State of California, were both denied. Pursuant to respondent's petition for writ of habeas corpus, the California Supreme Court rendered its de-

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[1]Cl. Tr. refers to the Clerk's Transcript of the proceedings in the Superior Court of the County of San Diego in and for the State of California. A certified copy of said transcript is filed with this Court.

cision on October 2, 1970, reducing respondent's conviction from a felony to a misdemeanor on the ground that the felony provisions of section 270 of the California Penal Code conflict with the federal right to travel from one state to another and resultantly deny equal protection of the laws under the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 13, of the California Constitution. (*See* Decision pp. 2, 7, 10-11.)

Factual Statement

Ann L. King married respondent in 1951, and subsequently had six children by him. [Rep. Tr. pp. 17-18.][2] Respondent and his family moved from the State of Georgia to Compton, California, sometime in 1957 or 1958. [Prel. Tr. pp. 14-15.][3]

In November 1959, respondent and his family, taking their personal belongings, moved to Mexico. [Prel. Tr. p. 16.] According to respondent, the exact date was November 27, 1959. [Rep. Tr. p. 53.] At Rosarita Beach, Mexico, respondent and his family rented a room in a motel. Respondent then left his family, not indicating where he was going. Respondent's wife went to the international border between the United States and Mexico in search of respondent. Because she was

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[2]Rep. Tr. refers to the Reporter's Transcript of the proceedings of the Superior Court below. A certified copy of this transcript is filed with this Court.

[3]Prel. Tr. refers to the transcript of the Preliminary Hearing held in the Superior Court below and on which the decision of the California Supreme Court was in part based. A certified copy of this transcript is filed with this Court.

running short of money, she then returned to California with the children and sought welfare assistance from San Diego County. [Prel. Tr. pp. 17-18.]

After respondent's disappearance, respondent's wife did not see him again until approximately July 1, 1960. At that time respondent appeared in San Diego, took one of the children, and went to Tijuana, Mexico. Respondent's wife followed him. After an altercation, respondent was arrested by Mexican authorities in Tijuana, Mexico, and Mrs. King returned to San Diego. [Rep. Tr. pp. 18-19.] Two days later Mrs. King again saw respondent when he drove back to her home in a rented car. Mrs. King called the police, but by the time they arrived, respondent was gone. This incident was the last she saw of respondent until the preliminary hearing. [Rep. Tr. pp. 19-20.]

Following the separation, Mrs. King worked most of the time in an attempt to support the children. However, it was necessary for her to receive public assistance almost continuously.

The records of the Department of Public Welfare reflect that since July 10, 1960, respondent has made no payments in support of his minor children. [Rep. Tr. p. 25.] During the period between the separation in December 1959 and respondent's conviction, she received no support whatsoever from respondent for the support of the six minor children. During this time she received letters from respondent. He asked her to send him clothes and other miscellaneous items. Respondent, who holds a bachelor's and master's degree, is a qualified school teacher. [Rep. Tr. pp. 21-22.]

After respondent left California in 1960, two efforts to obtain support through the Uniform Reciprocal Support Act failed. Respondent was arrested in Hawaii in 1961, but following the trial he fled to California. In January 1963 respondent was arrested in Miami, Florida. Respondent was ordered to pay $25 a week, but no payments pursuant to this order were made. Respondent was arrested in Chicago, Illinois, on May 22, 1966, for nonsupport. He waived extradiction and was brought to California. [Ex. 5.][4]

[4]Exhibit 5 refers to respondent's probation and supplemental probation reports in the Superior Court below and which were part of the record in the proceeding now under review. A true copy of each of said reports is filed with this Court.

ARGUMENT

I

The Decision of the California Supreme Court That the Felony Provisions of Section 270 of the California Penal Code Violate Equal Protection of the Laws Is Clearly Posited on a Misconception of the Federal Right to Travel, as Articulated by This Honorable Court in Recent Decisions, and Thus Presents a Substantial Federal Question

The decision of the California Supreme Court of which petitioner is seeking review invalidates the statutory provisions in question purportedly on the basis of State constitutional provisions. The decision states:

> "We hold that insofar as the section punishes nonsupporting fathers who 'remain out of the state for 30 days' more heavily than nonsupporting fathers who are within [the state], this penal provision establishes a classification not sufficiently related to any legitimate governmental objective, and as such violates the equal protection clause of our Constitution." (Emphasis added.) (Decision p. 2.)

The *true basis* of the decision is found in the words "not sufficiently related to any legitimate governmental objective," which pertain to respondent's main contention and to which the opinion directs itself at a later point in the case.

> "The state contends that it has a legitimate interest in facilitating the enforcement of the support obligations of section 270 . . . Such a purpose—to require individuals to move or remain in California—lacks constitutional sanction because it

> violates the individual's constitutional right to choose his own domicile and to travel freely throughout the country."

The court went on to cite as authority the recent cases of *United States v. Guest,* 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966), and *Shapiro v. Thompson,* 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). (Decision pp. 10-11.)

The decision recognizes that the principle embodied in the equal protection concept "does not preclude the state from drawing any distinctions between different groups of individuals, but does require that, at a minimum, classifications which are created bear a rational relationship to a legitimate public purpose." The decision nevertheless *concedes* the existence of an "arguable rational relationship" between the statutory provisions in question and the enforcement of support obligations. The statute is said to be invalid because it infringes on the federal right to travel. (Decision p. 7.)

Thus it appears that the decision in this matter was not based on an independent state ground, but was *compelled* by the California Supreme Court's own, it is submitted, erroneous concept of the federal right to travel. If the state court materially bases its decision on a determination of the federal question, this Honorable Court has indicated that it will review the case even though the state court ostensibly based its decision upon an adequate state ground. *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275, 290, 2 L. Ed. 1313, 78 S. Ct. 1174 (1958).

> "[W]here the non-federal ground is so interwoven with the other as not to be an independ-

ent matter, or is not of sufficient breadth to sustain the judgment without any decision of the [federal ground], our jurisdiction is plain. [Citations.] And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. [Citation.]" *Enterprise Irrig. Dist. v. Canal Co.*, 243 U.S. 157, 164, 37 L. Ed. 318, 61 S. Ct. 644 (1917).

II

Those Provisions of Section 270 of the California Penal Code Making the Misdemeanor of Willful Nonsupport a Felony When the Offender Simultaneously Remains Out of the State Territorial Boundaries for a Period in Excess of 30 Days Is Not an Invidious Discrimination Denying Equal Protection of the Laws, Since the Provisions Are Not a Penalty on the Right to Travel and, Furthermore, Are Based on a Rational and Compelling State Interest

A. The California Supreme Court Misconceived the Purpose of the Felony Provisions of Section 270 of the California Penal Code, Which Provisions Are Necessary to the Effective Enforcement of Nonsupport Laws Through Increased Deterrence and the Facilitation of Extradition of Offenders Who Remain Outside the Territorial Boundaries of State for the Proscribed Period of Time

The decision of the California Supreme Court reasoned that the "criminal quality" of the father's nonsupport was no greater when committed while the father was outside the state rather than inside the state. The decision further reasoned that the "valid general purposes" of the nonsupport statute had no relationship

to the location of the nonsupporting father.[5] (Decision p. 7.) In support of its reasoning, the decision cited the case of *People v. Jones,* 257 Cal. App. 2d 235, 238-39, 64 Cal.Rptr. 622 (1967), where it was stated:

> "Discrimination *solely* on the basis of location inside or outside of the state bears no more relation to the punitive and deterrent purposes of section 270 than differing locations of nonsupporting fathers within this state."

Petitioner submits that this reasoning is entirely incorrect. The greater punishment applies to circumstances under which a *greater deterrent* is necessary to prevent the commission of the crime. Secondly, the felony provisions facilitate the enforcement of the nonsupport provisions against fathers remaining outside the state by enhancing the chances for successful extradition.

The greater deterrent is necessary because fathers who are outside the territorial boundaries of the State of California are not amenable to California state process and must be extradited. It would be attributing undue naivete to delinquent fathers to argue that they are not aware of the existence of this law enforcement problem. When a father inside the state is willfully failing to support his children, he can be immediately arrested and prosecuted. On the other hand, the act of a father in remaining out of the state for a substantial period of time makes enforcement of support obligations unsatisfactory, if not a practical impossibility.

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[5]In raising this point, the California Supreme Court misunderstood petitioner's argument. The general purposes of the nonsupport statue were raised in support of the contention that they constituted a *compelling state interest.* This contention will be dealt with in a subsequent portion of this petition.

See Commissioners' Prefatory Notes to 1950 Act, Uniform Reciprocal Enforcement of Support, 9C Uniform Laws Annotated 3. Even after enactment in a substantial number of states of the Reciprocal Enforcement of Support Act, the increasing mobility of our society continues to make enforcement of support obligations for minor difficult. *See* Note, 48 Cornell L. Q. 541. Thus, it is probable that the Legislature of the State of California considered that a father outside the territorial boundaries of California might be more reluctant to take advantage of his location with respect to his support obligations when his offense is a felony rather than a misdemeanor.

Furthermore, when the father is not deterred, the felony provisions aid law enforcement by facilitating what has been referred to as the complicated and inefficient process of extradition. *United States v. Brandenburg,* 144 F.2d 656, 659 (3d Cir. 1944). Extradition of offenders who are not present in the demanding state at the time that the offense is committed are not "fugitives" under the federal constitutional and statutory provisions relating to extradition. Nevertheless, states are not limited to granting extradition under circumstances more broad than the constitutionally compelled duty. Thus, the Uniform Criminal Extradition Act, enacted by the great majority of the states, provides for the discretionary extradition of offenders who are not fugitives. *Criminal Extradition,* 9 Uniform Laws Annotated 294; *In re Cooper,* 53 Cal. 2d 772, 775-76, 3 Cal. Rptr. 140, 349 P. 2d 956 (1960), *appeal dismissed and cert. denied,* 364 U.S. 294, 5 L. Ed. 2d 83, 81 S. Ct. 104; *People ex rel. Waldman v. Ruthazer,* 2 Misc. 2d 297, 144 N.Y.S. 2d 429, 430 (1955).

The important feature to note regarding extradition under state laws similar to section 6 of the Uniform Criminal Extradition Act is that the decision to extradite is in the *discretion* of the governor. Under federal constitutional and statutory provisions, extradition is a duty. Realistically, the executive authority exercising this discretion will be influenced by the knowledge that the demanding state considers the offense committed to be a felony rather than a misdemeanor. Thus, making the offense of willfully failing to support minor children while beyond direct amenability to state process a felony facilities extradition as well as detering the commission of the offense originally.

Notwithstanding the foregoing, petitioner takes sharp issue with the view that the *criminal quality* of the out-of-state offender is no more serious than the father who remains in the state while failing to support his minor children. Because the father who remains out of the jurisdiction is not amenable to state process, the hardship and the deprivation which he has inflicted on his minor children is thereby prolonged. The reasons for his being outside the state's territorial boundaries bear no realtionship whatsoever to the degree of the deprivation to his dependent minors. The minor children are no less deprived when the father is unamenable because he is on a business trip, on an extended vacation, or residing permanently outside the state's territorial boundaries. *Differences in circumstances* resulting in different degrees of harm from criminal conduct are properly the basis of differing penalties. *Skinner v. Oklahoma,* 316 U.S. 535, 540, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942).

Therefore, the felony provisions of section 270 of the California Penal Code have as their basis deter-

rence of offenses under the circumstances to which they apply, enforcement of those provisions, and a criminal quality of conduct warranting a more severe punishment.

B. The Felony Provisions of Section 270 of the California Penal Code Do Not Penalize the Federal Right to Travel, Since the Claimed Interference Is in Fact Illusory and Since Said Provisions Apply Only to Criminal Offenders Who Are Subject to Prosecution by the State of California

The decision by the California Supreme Court that the felony provisions of section 270 of the California Penal Code violates the federal right to travel proceeds on the theory that these provisions encourage nonsupporting fathers to "move to, or remain in, California." Petitioner did not argue before the California Supreme Court, and is not arguing now, that it was the purpose or effect of the felony provision to "encourage"[6] fathers to move to California to avoid being prosecuted for a felony.

An analysis of this hypothetical interference with the right to travel will show that the interference is *in fact nonexistent*. If the nonsupporting father moves to California to avoid being prosecuted for a felony and at the same time resumes supporting his family, no compulsion to come to California exists, for the father is no less secure from prosecution by simply commencing his support without moving to California. Only where the father moves to California to avoid being prosecuted for a felony and at the same time continues his offense of nonsupport would the act of moving to

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[6]Petitioner wishes to point out that at no time did petitioner use the word "encourage" with respect to absent fathers *moving to California*. Petitioner did argue that the felony provisions "encourages" absent fathers to fulfill their *support obligations*.

California cause the father to be prosecuted for a misdemeanor instead of a felony. Such a possibility is so remote that it is hardly worthy of remark, much less of the basis for a constitutional holding. It would be an eccentric nonsupporting father indeed who, while continuing his unlawful conduct, would feel compelled to move to California, where he would be amenable to direct process and subject to immediate prosecution.

Petitioner submits that the hypothetical interference with the right to travel on which the decision is based is trivial if not totally illusory. The truly realistic evaluation of the function of the felony provisions of section 270 of the California Penal Code, however, is that the less eccentric nonsupporting father will choose to commence his support obligations rather than risk being extradited and prosecuted for the felony.

Assuming the existence of some limitation on movement from one state to another, not all such limitations are unconstitutional *penalties* on the right to travel. This Court stated in its recent decision in *Shapiro v. Thompson*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1332 (1969):

> "We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel." 394 U.S at 638 n. 21.

The felony provisions under consideration do not apply to a class of persons outside the State of Cali-

fornia who are engaged in lawful conduct, but do apply only to a class of persons who are at that time engaged in a criminal offense. It is the weight of authority and the better reasoned view that the nonsupporting father can be tried and convicted in a state in which he knowingly permitted his child to remain in destitute and necessitous circumstances, even though the father was not present in the state at the time of the occurrence. *Commonwealth v. Booth,* 266 Mass. 80, 165 N.E. 29, 31 (1929); 23 Ops.Cal.Atty.Gen. 210; *Jurisdiction and Venue of Criminal Charge for Child Desertion for Nonsupport as Affected by Nonresidence of Parent or Child,* 44 A.L.R. 2d 886, 899-901. As such an offender, the nonsupporting father is subject to extradition whether the offense be a misdemeanor or a felony. *Ex parte Mendoza,* 408 S.W. 2d 926, 928 (Tex. Cr. App. 1966).

Inasmuch as the nonsupporting father is subject to extradition for his offense, the exercise of his constitutional right to travel by refusal "to move to, or remain in, California" is by this fact alone sharply curtailed. The felony provisions of section 270 of the California Penal Code do not increase this curtailment but increase only the curtailment's effective enforcement.

Finally, it must be noted that the situation presented in this case is distinguishable from the situation present in *Shapiro v. Thompson, supra.* In the *Shapiro* case, the class of persons subject to the disability were welfare recipients. As such they were engaging in lawful conduct in seeking welfare benefits. The provisions involved in this case apply to a narrow class of persons, criminals, who at the time are engaged in unlawful conduct.

Therefore, the felony provisions of section 270 of the California Penal Code do not constitute an abridgment of the right to travel since their claimed abridgment is illusory. They do no more than facilitate the enforcement of an already existing limitation on that right and are aimed only at a narrow class to promote a legitimate state interest, the encouraging of support of minor children by fathers who are outside the territorial boundaries of the State of California.

C. The Felony Provisions of Section 270 of the California Penal Code Do Not Constitute an Invidious Discrimination Against a Person Exercising the Right to Travel, Since the Provisions Are Necessary to the Enforcement of Laws Designed to Promote a Compelling State Interest, the Prevention of Harmful Effects on Children Not Properly Supported by Their Fathers

In arguing that the "valid general purposes" of protecting children from the harmful effects of nonsupport do not furnish a valid basis for the felony-misdemeanor classification (Decision p. 9), the California Supreme Court completely misconceived the nature of petitioner's argument. It is petitioner's argument that *if* the felony provisions do constitute in any way an abridgment of the right to travel, this abridgment is justified by a compelling state interest. As petitioner stated in its Return to the Order to Show Cause on respondent's Petition for Habeas Corpus:

> "This compelling state interest is the protection of the welfare of children by requiring parents to provide support without the children having to become public charges. The interest of the state in

requiring parental support is not a mere matter of fiscal integrity. The state is concerned with the adverse impact of being a public charge on a child's growth and development, on his education and well being. This relationship between proper parental support and the child's welfare was recognized in an early California case, In re Mitchell, 19 Cal. App. 567, 48 A.L.R. 1193, 1194, in which the court stated:

> " 'Indeed, the provisions of section 270 in réality merely represent, as to the subject to which it relates, the crystallization of the power of police, under and by virtue of which the state is authorized to make all manner of reasonable and wholesome rules controlling and regulating the individual behavior of people in their intercourse with each other and toward society and government. . . . In the last analysis, the supreme purpose of all government is to promote and maintain the happiness of mankind, and the very first step to that end is the giving of such care and attention to infancy as that it may be developed and nurtured into sterling man and womanhood.' In re Mitchell, supra, at 571-72. See also People v. Sorensen, supra, 68 Cal. 2d 280, 287."

This argument by petitioner was misconceived by the California Supreme Court as an argument that the purposes behind the statutory provisions in question was preservation of fiscal integrity, which argument, in view of the *Shapiro* decision, petitioner never made. It should be pointed out that the California Supreme Court never reached this crucial issue as to compelling

state interest. In a footnote to the decision the Court said:

> "Inasmuch as section 270 serves to penalize the exercise of defendant's fundamental constitutional right to travel, its classification scheme could of course only be justified by a showing that the provision is 'necessary to promote a *compelling* governmental interest.' (Shapiro v. Thompson, 394 U.S. 618, 634; cf. Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 784-785.) Since we find that the basic objective of the felony provision—to induce nonsupporting fathers to come to California—is not a constitutionally legitimate one, we have no occasion to apply the compelling governmental interest test in the instant case." (Decision pp. 14-15 n. 7.)

This conclusion that the felony provisions have no constitutionally legitimate objective circuitously falls back on the conclusion that the "arguable rational" objective was in violation of the federal right to travel. (*See* Argument I.) But as heretofore pointed out, *even if* in fact such an interference with the right to travel does exist by the felony provisions, such provisions can nevertheless be justified in the presence of a compelling state interest. Because of the circuitous reasoning employed in the decision, the court below never reached this issue.

In a time where the environment in which children are raised is considered of great importance, what more compelling interest can exist than the interest of the state in preventing minor children from being subjected to the harmful and adverse impact both of deprivation of their rightful support and of becoming public charges?

D. Since the Statutory Classification Is Based Upon a Rational Scheme Designed to Cope With Different Circumstances Existing Within Each Class, Respondent Was Not Denied Equal Protection of the Laws

The ultimate conclusion reached by the decision of the California Supreme Court was that the classification allegedly based on the offender's residence and nonresidence in the state, was not rational. At the outset it should be pointed out that the classification under consideration is not in fact based upon residence and nonresidence. The classification is defined by *absence* from the territorial boundaries of the State of California without regard to the reasons for the absence. *Thus, it applies to a resident of California* who goes on a 30-day business trip or a 30-day vacation. It would also include nonresidents, since the difficulty of enforcement against those persons is no less severe than against California residents who remain out of the state.

The true basis of the classification is the differing circumstances relating to the deterrence of the crime of nonsupport and the effective enforcement of the nonsupport statute. The legislature of a state "may mark and set apart . . . classes and types of problems according to the needs . . . as dictated or suggested by experience." *Skinner v. Oklahoma,* 316 U.S. 535, 540, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). The equal protection clause is not a demand that a statute necessarily apply to all persons and does not require things which are different in fact to be treated in law as though they were the same. "Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi v. Yeager,* 384 U.S. 305, 309, 16 L. Ed. 2d 577, 86 S. Ct. 1497 (1966).

In holding that the classification under consideration was unreasonable, the court below constructed a hypothetical case in which it conceived that the classification "may often lead to what appears to be fortuitous, and even arbitrary, results." (Decision p. 8.) However, it has been said that "lack of equal protection is found in the *actual existence* of an invidious discrimination [citations], not in the mere possibility that there will be like or similar cases which will be treated more leniently." *Queenside Hills Co. v. Saxl,* 328 U.S. 80, 84-85, 90 L. Ed. 1096, 66 S. Ct. 50 (1946).

The resort by the court below to a hypothetical situation may have been attributable to the fact that the court below could not use respondent's case as an example. Petitioner argued before the court below that respondent had no standing to contend that his rights as a "nonresident" were infringed by the felony provisions under consideration. (*See* Decision pp. 16-17 n. 9.) The record was clear that at the time that respondent deserted his family, they had not established a domicile in Mexico. Therefore, at that time their domicile remained in California. Furthermore, as a practical matter, respondent virtually placed his family in California by abandoning them under circumstances where returning to California was their only conceivable choice. In reality, respondent never severed his ties as a resident of California at the time he left his family. [*See* Rep. Tr. p. 34.] The court refused to reach the resolution of the standing issue on the basis that "there [is] still no showing that the avoidance of his support obligations was a dominant purpose of defendant's departure from the state" and that "in any event, since we conclude that the state cannot be so construed, we need not resolve these contentions." (Decision p.

17 n. 9.) Thus, the Supreme Court concluded that it was unnecessary to decide whether respondent was a nonresident, because the statute could not be construed as applying to persons who leave the state for "a dominant purpose" of the avoidance of support obligations. Petitioner submits the conclusion is a nonsequitur. If respondent was still a resident of California at the time that he abandoned his children, respondent cannot argue that he is the victim of discrimination as a *nonresident* no matter how broad or narrow the provisions of the statute.

The opinion of the California Supreme Court expressed a view that the distinction based on geographical locality within as opposed to without the territorial boundaries of the State of California was of no significance. A number of state court decisions have held that classifications based on differing circumstances within different geographical localities do not deny equal protection. *State v. Guidry,* 247 La. 631, 173 S. 2d 192, 195 (1965); *State v. Gilmore,* 236 Or. 349, 388 P. 2d 451, 455 (1964); *People ex rel. Kipnis v. M'Cann,* 199 App. Div. 30, 191 N.Y.S. 574, 580 (1921). Thus, for instance, a state may impose a more severe punishment on the illegal importation of alcoholic beverages than on the illegal transportation within the state, since the degree of harm and difficulty of enforcement varies in each instance. *Hayes v. United States,* 112 F.2d 417, 421 (10th Cir. 1940). The decision of the California Supreme Court takes the view that the classification under the felony provisions of section 270 of the California Penal Code is based on nonresidency. Such is not the case. The additional penalty applies to all persons who remain out of the State of California for the proscribed pe-

riod, irrespective of their actual residency. Thus, if a resident of California remains out of the state for 30 days, he is as guilty of a felony as is a nonresdient who does so. Nevertheless, the principle that classifications based on differing circumstances do not deny equal protection is equally applicable to classifications distinguishing between residents and nonresidents. In the case of *District of Columbia v. Brooke,* 214 U.S. 138, 53 L. Ed. 941, 29 S. Ct. 560 (1909), this Court stated:

> "The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, non legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. . . ." 214 U.S. at 150.

Petitioner submits that the court below in its analysis failed to take into consideration the differing circumstances with respect to persons inside the State of California and outside the State of California. Instead, the court below treated nonsupporting fathers "abstractly as human beings" and not in regard to "the power to reach one and not the other." The decision in the *Brooke* case was clearly founded upon the considerations of law enforcement. As subsequently stated, in the *Brooke* case:

> "The statute under consideration in the case at bar enjoins a duty on both resident and non-resident lot owners, a duty necessary to be followed to pre-

> serve the health of the city. There is a *difference only in the manner of enforcing it,* a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record the distinction between residents and non-residents is a proper basis for classification. . . ." (Emphasis added.) 214 U.S. at 151.

Although in the present case the classifications are not based on residency, but are based on absence from the state by any person, nevertheless the considerations which would justify a classification based on residency also justify the classification in the present case.

III

The Felony Provisions of Section 270 of the California Penal Code Do Not Infringe on the Privilege and Immunities of Citizens of the Several States or of the United States Since the Provisions Are Not a Penalty on the Right to Travel and, Furthermore, Are Not Based on Citizenship but on a Valid Independent Reason

As heretofore argued, the classifications under the felony provisions of section 270 of the California Penal Code are not based on a distinction between residency and nonresidency. Neither is residence necessarily equivalent to citizenship, the basis of the privileges and immunities clauses of article IV, section 2, and the Fourteenth Amendment of the United States Constitution. *La Tourette v. McMasters,* 248 U.S. 465, 469-70, 63 L. Ed. 362, 39 S. Ct. 160 (1919). Nevertheless, the distinction between the terms does not permit a discrimination against nonresidents which has the

necessary effect of discriminating against citizens of other states. The question is whether there is a reasonable ground for the diversity of treatment to residents and nonresidents. *Travis v. Yale & Town Mfg. Co.*, 252 U.S. 60, 79, 64 L. Ed. 460, 40 S. Ct. 228 (1920).

Even if the classification in this case were founded on either residency or on citizenship as such, the valid independent reasons of facilitating law enforcement and deterring crime heretofore explained are sufficient to sustain the classification. In the case of *Toomer v. Witsell,* 334 U.S. 385, 92 L. Ed. 1460, 68 S. Ct. 1157 (1948), *rehearing denied,* 335 U.S. 837, 93 L. Ed. 389, 69 S. Ct. 12 (1948), this Court stated with respect to the privileges and immunities clause of article IV, section 2, of the Constitution:

> "It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U.S. at 396.

Furthermore, with respect to the right to travel, this Court has declined to attribute the existence of the right to travel to either the privileges and immunities clauses or the equal protection clause. *Shapiro v.*

Thompson, 394 U.S. 618, 630, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969). As heretofore argued, the felony provisions of section 270 of the California Penal Code do not interfere with the right to travel and therefore do not violate the equal protection clause. Petitioner submits that these provisions do not violate the privileges and immunities clauses for the same reasons.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,

WILLIAM E. JAMES,
Assistant Attorney General,

MARK LEICESTER,
Deputy Attorney General,

Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1509

STATE OF CALIFORNIA,
Petitioner,
vs.
CLENNON WASHINGTON KING,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent respectfully requests that the writ of certiorari be denied in the above-entitled case.

JURISDICTION

Jurisdiction of the Court is invoked by Petitioner under Section 1257(3), 28 USCA and Rule 22 of the

Rules of the Supreme Court of the United States. Respondent denies that this Court has jurisdiction.

The judgment of the Supreme Court of California to be reviewed was filed on October 2, 1970. Petition for Rehearing was denied on October 27, 1970 (*In Re King,* 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983).

OPINION BELOW

The Petitioner persists in misunderstanding the effect of the decision of the Supreme Court of the State of California and the grounds of its decision and in effect misquotes the opinion. Accordingly, we are forced to quote the opinion directly in answer to the petition. Respondent believes that upon examination of the opinion of the Supreme Court of the State of California, this Honorable Court will determine that it has no jurisdiction under Rule 22 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1) Does the opinion of the State Court rest upon an interpretation of State Law and the State Constitution or does it rest upon the Constitution of the United States so as to give this Court jurisdiction under Rule 22 of the Rules of the Supreme Court of the United States?

2) Assuming for the purpose of argument that the opinion of the Supreme Court of the State of Cali-

fornia rested on the United States Constitution alone and particularly the Fourteenth Amendment thereto and Article IV, Section 2 thereof, and the Federal right to travel, is the opinion correct in holding, as follows:

(a) That statutory provisions making an act a felony or a misdemeanor depending upon absence or presence in a state is a denial of equal protection of the laws;

(b) That such a statute violates the privileges and immunities clause of the Federal Constitution, and

(c) That such a statute impinges on the Federal right to travel (which is not attached to any written section of the Constitution)?

STATUTES INVOLVED

The Constitutional and statutory provisions are set forth in Decision to be reviewed as follows:

United States Constitution, Fourteenth Amendment;

United States Constitution, Article IV, Section 2 (cited only in a footnote in the opinion);

Article I, section 11 of the California Constitution;

Article I, section 21 of the California Constitution;

California Penal Code Section 270.

It is to be noted that the Petitioner does not mention the sections of the California Constitution in this

portion of its petition and mis-cites them on page 4 of its petition.

HISTORY OF THE CASE

We do not quarrel with Appellant's statement of the history of the case or the factual statement except that we do question the Petitioner's interpretation of the holding of the California Court and thus we are impelled to state the holding of the Court verbatim.

The Court first holds that—

> "the guarantees of equal protection embodied in the Fourteenth Amendment to the United States Constitution and article I, sections 11 and 21, of the California Constitution, prohibit the state from arbitrarily discriminating among persons subject to its jurisdiction . . . . (U)nder this section as presently drafted, any father who 'remains out of the state' of California for 30 days while not supporting his child is guilty of a felony; a father who commits the identical act of criminal nonfeasance, but happens to be within California, is guilty of only a misdemeanor. The application of this distinction may often lead to what appears to be fortuitous, and even arbitrary, results . . . . To justify this seemingly illogical classification the people proffer the two broad objectives which underline the nonsupport provision generally—(1) to protect public funds from the financial burden of supporting children whose fathers are able to support them and (2) to deter fathers from subjecting their children to the adverse impact of becoming public charges. *We can discern no rational relationship, however, between these*

> *unquestionably valid general purposes and the distinguishing factor—the location of a non-supporting father—upon which the felony-misdemeanor classification turns.*" (Italics added).
>
> *In re King,* 3 Cal.3d 226, 232, 233, 90 Cal.Rptr. 15, 19-20, App. A to Petition pp. 5-7.

Immediately following this holding is the only exclusively federal ground of the decision, the Constitutional right to travel from one state to another, and the California Court clearly does not equate this right with the equal protection clause but notes on the face of its opinion that it is a right so firmly established that it finds no explicit mention in the Constitution. (*In re King,* supra, 3 Cal.3d 234, 90 Cal.Rptr. 20, App. A p. 8.)

Finally in a footnote the California Court addresses itself to the privileges and immunities clause of Article IV, Section 2 of the Federal Constitution and holds that section 270 of the California Penal Code in practice will operate to penalize out-of-state citizens more heavily than California citizens and notes that the privileges and immunities clause and the constitutional right to travel are often coincident and that at one time the privileges and immunities clause was thought to be a source of the constitutional right to travel. (*In re King,* supra, 3 Cal.3d 235, 90 Cal.Rptr. 21, App. A p. 11.)

With respect to Petitioner's statement of the facts, Respondent asserts that this Court is bound by the State of California's interpretation of Section 270 and its holding as to Petitioner's capacity to challenge the

statute since both of those matters are questions of state law and thus this Court has before it a decision of the State of California holding that a statute which makes a difference in the penalty on whether the act of nonfeasance is committed within the State of California or outside the state of California violates two Sections of the California Constitution which read as follows:

Section 11 of the California Constitution reads:

> "All laws of a general nature shall have a uniform operation."

Section 21 of the California Constitution reads:

> "No special privilege or immunity shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen or class of citizens, be granted privileges or immunities, which, upon the same terms, shall not be granted to all citizens."

ARGUMENT

1. SECTIONS 11 AND 21 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF CALIFORNIA FURNISH INDEPENDENT PROTECTION IN THE JURISDICTION OF THE STATE OF CALIFORNIA AND SUPPLEMENT THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION.

This Court has repeatedly made a distinction between those cases where the State Court purports to be holding on an exclusively Federal ground and those cases where the Court is interpreting its own State provisions supplementing the Federal Constitution.

In *Department of Mental Hygiene v. Kirchner,* 380 U.S. 194, 13 L.Ed. 753, 85 S.Ct. 871, this Court, in refusing to issue a writ of certiorari to determine whether a statute imposing liability upon relatives for care in State institutions was constitutional under the Federal Constitution, returned the case to the California Court for a clarification of its holding and in *Kirchner v. Department of Mental Hygiene,* 62 Cal. 2d 586, 43 C.R. 329, 400 P.2d 321, the California Court appropriately stated that Sections 11 and 21 of Article I of the California Constitution furnished independent protection in California and were the equivalent to the equal protection clause of the Federal Constitution but supplemented it. (See also *Black v. Cutter Laboratories,* 351 U.S. 292, 76 S.Ct. 824 100 L.Ed. 1188).

Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 290 2 L.Ed. 1313, 78 S.Ct. 1174 (1958), relied on by Petitioner, has no application to the case at bar. There is in this case no interweaving with the Federal grounds. That case rested on the interpretation of a Federal Statute solely which the State Court erroneously interpreted. There is no question here that the State Court properly interprets its own constitution. Other cases in California which rest solely on the Federal Constitution are properly subject to writ of certiorari and have no application to the case at bar. (See for example *People v. Green,* 70 Cal.2d 654, 75 C.R. 782, reviewed in *California v. Green,* 399 U.S. 149 (sole basis of California decision, the confrontation clause of the Federal Constitution); *Byers v.*

Justice Court, 71 Cal.2d 1039, 80 Cal.Rptr. 553, reviewed May 17, 1971, *California v. Byers,* 39 U.S.L.W. 4579 (California decision based wholly on Fifth Amendment to the United States Constitution).

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2. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED IN THE DECISION OF THE CALIFORNIA SUPREME COURT OF WHICH PETITIONER SEEKS REVIEW.

a) The principle of *Skinner v. Oklahoma,* 316 U.S. 535, 62 S.Ct. 1110, governs the case before the Court. Only when there are degrees of evil in conduct may punishments be different. There is no difference in the degree of evil of the nonfeasance of non-support whether it be within the State of California or without that State. The degree of punishment herein proposed making the difference of misdemeanor treatment or felony treatment is comparable to the sterilization procedure condemned in *Skinner v. Oklahoma,* supra. A man convicted of a felony in most states of the Union loses most, if not all, of his civil rights and the effect of such conviction follows him for the rest of his days, whereas, a misdemeanor conviction has little, if any, effect upon his future life, and, thus, it is respectfully submitted that *Skinner v. Oklahoma* controls this decision.

Likewise, it is respectfully submitted that *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1969, effectively disposes of the argument that the State of California has a compelling governmental interest which would justify the restriction imposed upon non-residents'

rights to remain non-residents by Penal Code §270. Here there is no evidence of any compelling public interest and no evidence was presented of any compelling public interest except a broad assertion that by use of this statute they might compel absent fathers to support their children. It seems clear, as was held by the Supreme Court of California, that making a father a felon in order to secure that his child is not a public charge can hardly be called a compelling public interest.

Finally, it is respectfully submitted that a parenthetical remark in a footnote, with respect to the privilege and immunities clause of the Federal Constitution, does not justify the issuance of a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for a writ of certiorari in the instant case.

Dated, Carmel, California,
June 2, 1971.

HEISLER & STEWART,
By FRANCIS HEISLER,
CHARLES A. STEWART,
PETER HABERFELD,
RICHARD M. SILVER,
PATRICIA LANE,
Attorneys for Respondent.